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Travis Turner v. Lone Peak Public Safety District : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TRAVIS TURNER

Appellant

Appellate Case No.: 20090191

v.

LONE PEAK PUBLIC SAFETY DISTRICT

Appellee.

BRIEF OF APPELLANT

PETITION FOR REVIEW OF AGENCY ACTION

of the

Lone Peak Public Safety District

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STATEMENT OF JURISDICTION

Pursuant to the provision of UCA Section 63G-4-403 jurisdiction of this Petition for Review is in the Supreme Court or Court of Appeals. This is an appeal from the decision of the Lone Peak Public Safety District entered on February 18, 2009.

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Was the ruling of the Board, after finding that Appellant made statements while under the influence of alcohol and legally prescribed prescription medication, a correct application of law justifying termination?

Standard of review: *“When reviewing a formal adjudicative proceeding the standard of review set out in Utah Code section 59-1-610 applies. The court must review the Commission’s finding of fact under a “substantial evidence” standard. See Utah Code Ann Section 59-1-610 (a) (1996). In other words, the court of appeals must uphold those findings of fact that are supported by substantial evidence, or “that quantum and quality of relevant evidence which is adequate to convince a reasonable mind to support a conclusion. The court of appeals must review the Commission’s*

conclusion of law for correctness giving no deference to the tribunals

legal determination. See Section 59-1-610 (1) (b). Yeargin Inc. v.

Auditing Div of the Utah State Tax Comm'n, 20 P. 3rd 287, 291 (UT 2001)

Tolman v. Salt Lake County Attorney 818 P.2d 23, 27 (Ut. App. 1991)

2. Whether the termination of Appellant was arbitrary and oppressive and in violation of his Due Process Rights pursuant to the Fourteenth Amendment to the United States Constitution and specifically violating appellant's fundamental liberty interest in Free Speech secured by the First Amendment to the United States Constitution?

Standard of Review: The court of appeals must review the Commission's

conclusion of law for correctness giving no deference to the tribunal's

legal determination. See Section 59-1-610 (1) (b). Yeargin Inc. v.

Auditing Div of the Utah State Tax Comm'n, 20 P 3rd 287, 291 (UT 2001)

Tolman v. Salt Lake County Attorney 818 P.2d 23, 27 (Ut. App. 1991)

Due process challenges are questions of general law and no deference to

the agency's determination of what constitutes due process as reflected by

the actual hearing, Utah Dept. of Admin. Servs.v. Public Service

Commission, 658 P.2d. 602, 608 (UT 1983). See also Bunnell v. Industrial

Comm'n, 740 P.2d 1331, 1333 (Utah 1987).

3. Whether Appellant was deprived of his constitutionally protected right to employment because the District exceeded its narrowly defined authority limiting punishment of employees only for acts committed in public, in direct violation of the First and Fourteenth Amendments to the Constitution of the United States.

Standard of Review: *The court of appeals must review the Commission's conclusion of law for correctness giving no deference to the tribunal's legal determination. See Section 59-1-610 (1) (b). Yeargin Inc. v.*

Auditing Div of the Utah State Tax Comm'n, 20 P. 3rd 287, 291 (UT 2001)
Tolman v. Salt Lake County Attorney 818 P.2d 23, 27 (Ut. App. 1991)

4. Whether the Board of Appeals erred in finding that termination was a proportionate and proper sanction for his action?

Standard of Review: *In determining whether the sanction of dismissal is warranted the Appellant must show either (1) that the facts do not support the action taken by the Department or (2) that the charges do not warrant the sanction imposed (Kelly v. Salt Lake City Civil Serv. Comm'n, 8 P.3rd 1048). In reviewing whether the "charges warrant termination" the decision is evaluated to determine "if the Board has abused its discretion or exceeded its authority. Harmon v. Ogden City Civil Service Comm'n, 171 P.3rd 474, 477, 2007 UT App 336).*

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES AND REGULATIONS OF WHOSE INTERPRETATION IS DETERMINATIVE OR OF CENTRAL IMPORTANCE

1. Constitution of the United States-Bill of Rights Amendment I (Speech)
2. Constitution of the State of Utah Article 1 Section 1
3. Constitution of the United States Fourteenth Amendment (Due Process)
4. Section 2 of the General Provisions of the Lone Peak Public Safety District Policy
5. Utah Code Section 76-5-107 Terroristic Threats
6. Utah Code Section 76-8-313 Threatening elected officials -- Assault.
7. Utah Code Section 76-8-314 elected officials defined
8. Utah Code Section 17B-1-803

MARSHALLING THE EVIDENCE

The challenged findings on this appeal concern whether the words spoken during a 2 a.m. surreptitiously recorded telephone conversation between Travis Turner and his former spouse can be deemed as misconduct justifying termination and whether the words spoken during the conversation can be considered as a legal threat or a violation of any law.

MARSHALED EVIDENCE SUPPORTING THE FINDING OF THE LONE PEAK PUBLIC SAFETY DISTRICT APPEALS BOARD

On September 7, 2008 at 2 o'clock a.m. during a surreptitiously recorded telephone conversation between Travis Turner and his former wife, Tara Turner, Travis Turner made the following statement, which is the nexus or core element forming the basis of Mr. Turner's termination:

"I will kill people, Tara. And I'll start with that fat fuck Chad Smith. You think I am fucking kidding? You think I'm kidding? I will go postal. And I have plenty of guns and ammo to do it." (Transcript of telephone conversation entered into evidence as Exhibit 2 R p. 366 pages 27-28) see also R p. 89 l. 14-21, R p. 95 l 15-12, testimony of Tara Turner, R p. 50 l. 7-12 testimony of Chief Bodkin.

In addition to the telephonic recording, Tara Turner testified to the following alleged statements of Travis Turner which she also testified to in support of a protective order she sought after the September 7, 2008 telephone call set forth in 1 above.

"I think you should drop the charges with Stephanie." R p. 97 l. 4-5; Lehi Police Dept "Narrative Statement of Fact" Exhibit 3 R p. 375.

"I know that me asking you to do this is wrong and I could lose my job, but she is young and you are going to destroy her future with a criminal record." (R. p. 97 l. 10-12, Exhibit 3 R p. 376).

STATEMENT OF THE CASE

This is an appeal from the decision of the Lone Peak Public Safety District Board of Appeal conducted over a three evening period on January 22, February 5, and February 22, 2009 upholding the termination of Travis Turner, a Lone Peak police officer.

Early in the morning on of February 7, 2009 prior to going to bed, Travis Turner consumed alcohol and took his regularly prescribed anxiety medication together with Loritab and Klonopin (R p.28 l. 21, R p. 229 l. 1) Mr. Turner's experience on Klonopin was that it affected his judgment and memory and really "through him for a loop" (R p.244 l.1-3). At approximately 2 a.m. Travis was awoken by a telephone call from his former spouse, Tara Turner (R p.228 l. 3-7; R p. 229 l. 5.) The telephone conversation was surreptitiously recorded by Tara Turner (R p. 85 l. 8-9; R. p. 242 l. 11-13; R p.418, Finding of Appeals Board 11). During the telephone conversation Travis Turner was under the influence of alcohol and prescription medications (R. p.419 Appeal Board Finding of Fact 14)

Tara Turner took the recording to the Lehi Police Department and later, delivered a copy to Lt. Gwilliam of the Lone Peak Police Department (R p. 140 l. 3-6).

A temporary protective order was issued by the Fourth District Court on September 8, 2008, served on Travis Turner on September 9, 2008 and dismissed on October 9, 2008 following a hearing before the Court Commissioner (R. p.282 l. 2-5).¹ As a result of the issuance of the protective order Travis Turner was placed on administrative leave and the Department commenced an internal investigation concerning Travis Turner.

Following the internal affairs investigation Chief Botkin² conducted a pre-disciplinary hearing. On November 21, 2008 Chief Botkin issued a termination recommendation (R. p.358). Chief Botkin's findings concluded that Travis Turner violated specific district policies that included; "Conduct which discredits the District," "Violations of criminal laws," "Conduct unbecoming an employee" and "Acts evidencing moral turpitude."

On November 24, 2008 the recommendation of Chief Botkin was "grieved" by email to Ted J. Stillman, Director Lone Peak Public Safety District and on November 26, 2008 said Grievance was supplemented (Appendix p.1). Director Stillman affirmed the decision of Chief Botkin on December 4, 2008 (R p. 1)

¹ At the time of the hearing before the Appeals Board the decision of the Commissioner dismissing the protective order was on appeal to the District Court.

² Chief Botkin is incorrectly referred to throughout the record as Chief "Bodkin" for the purpose of this brief Chief Botkin's correct name will be utilized

On December 8, 2008 the decision of Director Stillman, to affirm the termination of Travis Turner, was appealed to the Lone Peak Public Safety District Board of Appeal (R. p. 380-383).

Following three evening of hearings, the Lone Peak Public Safety District Board of Appeal, on a 3-1 vote, issued factual and legal conclusions upholding the termination of Travis Turner. The Board specifically concluded that:

Mr. Turners conduct on September 7, 2008 constituted “misconduct” categorized as; “Conduct which discredits the department,” “Conduct unbecoming and employee,” and “acts evidencing moral turpitude.” (R. p. 421 Ruling of the Appeal Board finding 3).

Although the Appeals Board specifically found that, at the time of the recorded telephone call, “Mr. Turner was under the influence of alcohol and legally prescribed medications” (R. p. 419 Appeal Board Finding of Fact 14)³ the Board concluded that being under the influence of alcohol and legally prescribed medication;

“does not mitigate *against* Mr. Turner being disciplined for this misconduct but does in fact argue in favor of the District needing to discipline Mr. Turner (R. p. 421 Appeal Board Conclusion 4).

³ The Board had ample evidence to support this finding based on the Testimony of Travis Turner regarding how Klonopin affected him (R. p. 238- L. 1-3) together with pharmaceutical data establishing side effects of Klonopin and Zolpidem (Ambien).

The Board further held that termination was justified because the September 7, 2008 conversation;

“...involved threats of violence, including the threat to use a gun and involved outside police agencies.....potentially putting the residents of Alpine City and Highland City at risk (R. p. 421 Appeal Board Conclusion 5).

Prior to Appellant’s termination he had only one written reprimand during his employment with the District (R. p. 420; Appeal Board finding 23).⁴ Mr. Turner had no memory of participating in the September 7, 2008 conversation (R. p. 243 l. 20-23, R. p. 260, l. 11, R. p. 267 l. 8-11,), although he acknowledged that it was his voice on the tape recording (R. p. 244 l. 14-17, Appeal Board Decision R.p.418 Finding 12).

⁴ The only prior reprimand in Appellant’s employment file was in the form of a letter of caution received by Travis Turner approximately seven years prior to this incident when he was cautioned by Lt. Gwilliam because he wore a short sleeve shirt on a designated long sleeve day (R p.179 l. 12-20; R. p. 184 l. 4-11).

SUMMARY OF ARGUMENTS

POINT I

The Lone Peak Public Safety District Board of Appeal, after finding that Appellant's statements were made while under the influence of alcohol and legally prescribed prescription medication, committed error by misapplying the law and upholding the termination of Appellant.

POINT II

The Lone Peak Public Safety District violated Appellants Fourteenth Amendment Substantive Due Process Rights when it upheld his termination based solely on the content of a surreptitiously recorded private conversation where there was no evidence of intent to communicate a threat and based further on Appellants lack of capacity to foresee that his non remembered statements could reasonably be interpreted as a threat, in violation of the exercise of Appellants fundamental liberty interest in free speech as guaranteed by the First Amendment to the Constitution of the United States.

POINT III

The Lone Peak Public Safety District exceeded its authority to sanction Appellant by ignoring its own Rules and Regulations which limit the authority

of the district to punish employees only for acts committed in public, in violation of Appellants First and Fourteenth Amendment rights pursuant to the Constitution of the United States.

POINT IV

The Board of Appeals erred in finding that termination was a proportionate and proper sanction for his action

ARGUMENT

POINT I

The Lone Peak Public Safety District Board of Appeal, committed error by misapplying the law and upholding the termination of Appellant.

This court has previously ruled on a case that is striking similar to the underlying facts of this case dealing with statements made while under the influence of prescription medication, but with important factual and critical legal differences, *Kelly v. Salt Lake City Civil Service Comm.* 8 p.3d 1048, (UT App 2000).

In *Kelly*, a Salt Lake City police officer, intoxicated due to the effects of Ambien, repeatedly called the police and fire dispatch center. The calls were of a bizarre and inappropriate nature, included sexual innuendo, and false information regarding a reported fire. Dispatch learned the identity of the caller

and after checking on her welfare reported the incident to the police department *Kelly*, 1050. An Internal Affairs investigation was thereafter conducted and the Chief of Police decided to terminate officer Kelly not based on this one incident but rather Kelly's "history of sustained complaints," and "because of the gravity of her latest misconduct, coupled with her employment history" *Id.* 1051. This is where the facts of this appeal dramatically diverge from *Kelly*.

The Board of Appeal in the present action specifically concluded that although there was some testimony that prior conduct of Officer Turner affected the Department that;

"this personal conduct alone, being remote in time to the termination at issue in this hearing, and not the subject of any written discipline by the District when it first became known to the District, does not rise to the level of being "misconduct" or "cause" under the District's policies and cannot be basis for the termination of Mr. Turner (R. p. 420 Board of Appeals Decision Conclusion 2).

During the hearing of Officer Turners appeal, no evidence of other complaints or similar action by Officer Turner was introduced. Officer Turner had recently been promoted to Sergeant (R. p. 417 Board of Appeals Decision finding 4); his employment file contained only one written reprimand that had been issued for wearing a short sleeve shirt on day designated for wearing long sleeve shirts" (R p.179 l. 12-20; R. p. 184 l. 4-11; R. p. 417 Board of Appeals

Decision Finding 23). Finally, unlike the Chief in *Kelly* at 1054, there was no evidence that Chief Botkin followed or had issued any form of progressive discipline (R. p. 420 Board of Appeals Decision Conclusion 2).

The Appeal Board's decision to uphold the termination of Mr. Turner, unlike the decision of the court in *Kelly*, was based only on one incident; the surreptitiously recorded telephone conversation made at a time, as found by the Board, when Travis Turner was under the influence of alcohol and prescription medication. Based on this conversation alone the Board found that Travis Turner's conduct constituted;

“conduct which discredits the District,” “conduct unbecoming an employee,” and “acts evidencing moral turpitude” (R. p. 421 Board of Appeals Decision Conclusion 3).

The charge of “conduct unbecoming an officer.” requires at least a demonstration that the officers conduct, was voluntary so that she can be shown to be responsible for the action themselves....” *Kelly*, 1053; citing *Perry v. Philadelphia Civil Service Commission* 529 A. 2d 616 (1987).

The *Perry* court, citing *Civil Service Commission v. Dillon*, 518 A. 2d 869 (1986) “held that such a charge requires at least a demonstration that the officer's conduct was voluntary so that he can be shown to be responsible for the

action themselves, without regard to any intention which he may or may not have had concerning their effect.” *Dillon* 870.

In *Kelly*, this court recognized that the issue of whether or not Officer Kelly’s conduct was voluntary was legally significant when it stated that;

“Had Kelly *not been* intoxicated when she made the non-emergency phone calls...., there is no doubt her actions would be conduct unbecoming an officer...” Id. 1053.

The decision of the court in *Kelly*, was not focused on the involuntariness of Officer Kelly’s intoxicated conduct but rather, and unlike the facts in Travis Turners case, was based on a finding by the Commission “that Officer Kelly ingested the medication in a manner inconsistent with medical advice was voluntary, thereby making her responsible for her conduct while intoxicated” *Kelly*, 1053.

The Appeals Board in this case, made no finding that Travis Turners intoxication was voluntary or contrary to medical advice. No evidence was introduced that could support such a finding.

The fact that the Board found Officer Turner to be intoxicated with alcohol and prescription medications, without any evidence or challenge by the Department that his intoxication was voluntary or contrary to medical directives, demonstrates that the Board ignored the fact that Travis Turners

conduct was not voluntary and he should therefore not be responsible for his conduct when it upheld his termination for “conduct unbecoming an officer “or for any other reason, based solely upon the surreptitiously recorded telephone conversation of September 7, 2008.

ARGUMENT

POINT II

The Lone Peak Public Safety District violated Appellants Fourteenth Amendment Substantive Due Process Rights when it upheld his termination based solely on the content of a surreptitiously recorded private conversation where there was no evidence of intent to communicate a threat and based further on Appellants lack of capacity to foresee that his non remembered statements could reasonably be interpreted as a threat, in violation of the exercise of Appellants fundamental liberty interest in free speech as guaranteed by the First Amendment to the Constitution of the United States and his Substantive Due Process Rights guaranteed by the Fourteenth Amendment.

The First Amendment guarantees the right of Freedom of Expression and the Fourteenth Amendment prohibits a state from “depriving any person of life, liberty, or property, without due process of law,” U.S. Const., amend.14 Sec. 1.

The Due Process Clause “guarantees more than fair process.” *Seegmiller v. Laverkin City*, 528 F3rd 762, 766 (10th Cir. 2008) citing; *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The Due Process Clause “covers a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them” *Seegmiller* 766, 767, citing

County of Sacramento v. Lewis, 523 U.S. 833, 840 (1997). In its substantive mode, the Fourteenth Amendment provides protection against arbitrary and oppressive government action, even when taken to further a legitimate governmental objective, *Id* at 845-846.

The Supreme Court has described two strands of the substantive doctrine. One strand protects an individual's fundamental liberty interest, while the other protects against the exercise of governmental power that shocks the conscience *Seegmiller* 767.

A fundamental right or liberty interest is one that is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," *Seegmiller* 767, citing *Chavez v. Martinez*, 538 U.S. 760, 775 (2003). The right of free speech is a fundamental right or liberty interest that is deeply rooted in our nation's history and tradition and is implicit in the concept of ordered liberty guaranteed by the First Amendment to the Constitution of the United States. The Fourteenth Amendment forbids the government to infringe fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Seegmiller* 767, citing *Glucksberg* 521 U.S. at 721.

In this case, Travis Turner was terminated based solely on the content of a private verbal statement, made during a 2 A.M. telephone conversation while he was under the influence of alcohol and prescription medication (R. p. 419 finding 14). Travis Turner did not have a memory of participating in the conversation (R. p. 243 l. 20-23). The statement was found by the Appeal Board, in spite of its finding of Travis's intoxication, to be a threat directed at the Lehi Chief of Police justifying his termination.

Admittedly the First Amendment does not protect against threats of violence *Watts v. United States*, 394 U.S. 705 (1969). The Supreme Court in *Watts* set forth no particular definition or description of a true threat that distinguishes an unprotected threat from protected speech *Doe v. Pulaski County Special School Dist*, 306 F.3rd 616 (8th Cir. 2002).

Following *Watts*, the lower courts were left to ascertain for themselves when a statement triggers the government's interest in preventing the disruption and fear of violence associated with a threat, *Pulaski*, 622. The *Pulaski* court, in examining rulings of federal court of appeals that have announced a test to parse true threats from protected speech, found two camps of thought;

“All the courts to have reached the issue have consistently adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm. See *Id.* *The views*

among the courts diverge, however, in determining from whose viewpoint the statement should be interpreted. Some ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient's shoes would view the alleged threat.” *Pulaski* 622 citing, “*Compare Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1075 (9th Cir. 2002) (en banc), with *United States v. Malik*, 16 F.3d 45, 49 (2d Cir.), cert. denied, 513 U.S. 968, 115 S. Ct. 435, 130 L.Ed.2d 347 (1994).

The Utah Court is in the “camp” identified in *Pulaski* that focuses its analysis of a true threat from the viewpoint of the person making the statement rather than from the viewpoint of the person who hears the communication. Last year this court announced the applicable standard to establish whether a person intended to make a threat when it held that “Intent is established when a person makes a threat that a reasonable person would *foresee* as being interpreted by those to whom the defendant communicates the statement as a serious expression of intent to harm or assault”, *State v. Johnson* 178 P.3d 915, 919 (UT. App. 2008), citing *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir.1990).

Counsel for Respondent repeatedly, and contrary to the ruling of *Johnson*, misstated the law by arguing that intent to make a threat is established when the person who hears the threat takes it seriously, thus establishing a violation of the law (R. p. 388). The Appeal Board utilized a clearly erroneous legal standard by

analyzing Mr. Turner's language from the viewpoint of the person who hears the statement rather than from the speaker's (Travis Turner) viewpoint as to whether he could reasonably foresee the statement would be interpreted as a serious threat.

The finding by the Appeal Board that Travis was under the influence of liquor and prescription medication requires a conclusion that Travis Turner did not have the mental acumen or ability to foresee how his statements would be interpreted by his former spouse. Travis was so intoxicated that he did not even remember participating in the conversation (R. p. 243 l. 20-23). In effect, the Appeal Boards ruling upheld the termination of Travis Turner because he was intoxicated (R. p. 421 Appeal Board Conclusion 4) and without regard to Travis's lack of capacity, to appreciate or foresee the possible effects of the statements made to his former spouse as required by *Johnson* Id. 919.

Not only did Travis Turner not have the capacity to foresee the effect of his statements, he did not have had the intent to communicate any threat at all. To punish or discipline an individual for a true threat the speaker must have *intentionally* or *knowingly* communicated the statement in question to someone *Pulaski*, citing *Planned Parenthood of the Columbia/Willamette, Inc. v. Am.*

Coalition of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002). Intent is a key element in the Utah Statutes that provide criminal sanctions for threats.⁵

Before the *Pulaski* court commenced an analysis as to whether the letter written by J.M. was a true threat or protected speech it considered the threshold question of whether, J.M., *intended to communicate the purported threat*, Id, 624. The *Pulaski* court's reasoning in considering J.M.'s intent to communicate a threat before actually analyzing the content of J.M.'s letter was that "*requiring less than an intent to communicate the purported threat would run afoul of the notion that an individual's most protected right is to be free from governmental interference in the sanctity of his home and in the sanctity of his own personal thoughts*," *Pulaski*, 624 citing *Stanley v. Georgia*, 394 U.S. 557 (1969).

The court in *Pulaski* ultimately found that J.M intended to communicate a threat because he allowed a friend, D.M., to read a threatening letter that J.M. had written. Thereafter D.M. without the knowledge or permission of J.M. obtained a copy of the letter and delivered it to the person who the letter

⁵ There is no Utah Statute that specifically sanctions mere threatening language. Utah Code Section 76-5-107 sanctions Terroristic threats if the use of a weapon of mass destruction or the hoax of a weapon of mass destruction is threatened and then the threat is made with *specific intent*.... (In this case there is no mention of a weapon of mass destruction). Utah Code Section 76-8-313 defines assault on an elected official when he threatens to inflict bodily injury on an elected official with *the intent* to impede.... (In this case the Lehi Chief of police is not an elected official

threatened.⁶ The scenario in *Pulaski* is very different than the case at bar. First, J.M. intended to write a threatening letter, he was not incapacitated or intoxicated at the time he wrote it; while Travis Turner had no intention of communicating a threat and was intoxicated at the time. Second, J.M. knew and appreciated that he was recording his thoughts in a written form; while Travis Turner, who not only did not remember participating in the conversation, did not know that his intoxicated statement was being recorded. Third, J.M. shared his intentionally written thoughts with another individual; while Travis Turner, again did not even remember participating in the conversation with his ex-wife. Finally, and another major difference between the findings in *Pulaski* and this case, the *Pulaski* court utilized the reasonable recipient standard, viewing the threat from the viewpoint of the recipient, Id. 624 while Utah Law requires a true threat analysis applying the viewpoint of the communicator as required by *Johnson* Id. 919. An analysis of Travis Turners statement utilizing the Johnson required analysis would require a very different conclusion because Travis Turner, because of incapacity, could not have foreseen or contemplated the effect of his non -remembered statement.

⁶ The Pulaski Court “is in the camp that views the nature of the alleged threat from the viewpoint of a reasonable recipient” Pulaski 622

The Appeal Board clearly committed legal error resulting in the denial of Mr. Turner's constitutional rights under the 1st and 14th Amendments to the United States Constitution by upholding the decision of the Department to terminate Mr. Turner

POINT III

The Lone Peak Public Safety District deprived Appellant of his property interest in employment when it exceeded its authority by imposing a sanction for a non-public statement in violation of Appellants First and Fourteenth Amendment rights pursuant to the Constitution of the United States.

In this case Mr. Turner has been deprived of a property right to continued employment which has consistently been determined to be a constitutional protected right requiring protection of the Due Process Clause. An employee possesses a property interest in public employment if they have tenure, a contract for a fixed term, an implied promise of continued employment, or if state law allows dismissal only for cause or its equivalent. *Darr v. Town of Telluride* Colo 495 F.3d (10th Cir. 2007) *See Id.* at 576-77, 92 S. Ct. 2701; *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Greene v. Barrett*, 174 F.3d 1136, 1140-41 (10th Cir.1999). The Rules and Regulations of the Department (R. Appendix 4 sub 1), together with Section 17B-1-803 UCA, establish that state law allows dismissal only for cause or its equivalent. See also *Potts v. Davis County* 010609 FED10, 07-4139 United States Court of Appeals, Tenth Circuit Jan 6, 2009.

The Rules and Regulations of the Lone Peak Public Safety District provide notice to its employees of their required conduct “in dealing with the *general public*” as follows: Section 2 GENERAL;

The conduct of Public Safety District employees in dealing with the general public is expected and required to be commensurate with the high level of public trust placed upon the Public Safety profession. Any *public action*, inaction, attitude or *opinion* of personnel which can be interpreted as unprofessional or unworthy of the public trust in Public Safety Officials tends to undermine and detract from the public respect of Public Safety Members individually and collectively. (Appendix 4 sub-section 2 p.52)

The foregoing District policy, in light of the First and Fourteenth Amendments to the Constitution of the United States, dangerously extends to include “*attitudes or opinions*” held by the employee. The policy is tempered and conditioned by the requirement that the attitude or opinion must be made or demonstrated in “*public.*”

The Fourteenth Amendment forbids the government to infringe fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” *Seegmiller Id. 767*, citing *Glucksberg* 521 U.S. at 721.

The District policy regarding the conduct of its employees appears to be an attempt to narrowly tailor the situations where employees may be sanctioned

for action, inaction or opinions demonstrated or expressed *in public*. Assuming, for argument purposes only, that the District has some compelling governmental interest to sanctioning employees for public action or expression of opinions which may embarrass the district in a public setting, there is no question but that the district does not have the right to abridge its employee's fundamental liberty rights to free speech or their private opinion or belief not expressed in public.

The termination of Travis Turner deprived him of his constitutionally protected property interest in continued employment. The termination is a violation of his First and Fourteenth Amendment rights. Additionally, the termination by the District was contrary and beyond the scope of its announced and presumably narrowly tailored policy to reserve the right to sanction employee conduct if committed or opinions were expressed in public.

POINT IV

The Board of Appeals erred in finding that termination was a proportionate and proper sanction.

A determination of whether the sanction of dismissal is not proportionate requires appellant to show either (1) that the facts do not support the action taken by the District or (2) that the charges do not warrant the sanction imposed *Kelly v. Salt Lake City Civil Serv. Comm'n*, 8 P.3rd 1048 (Ut. App 2000).

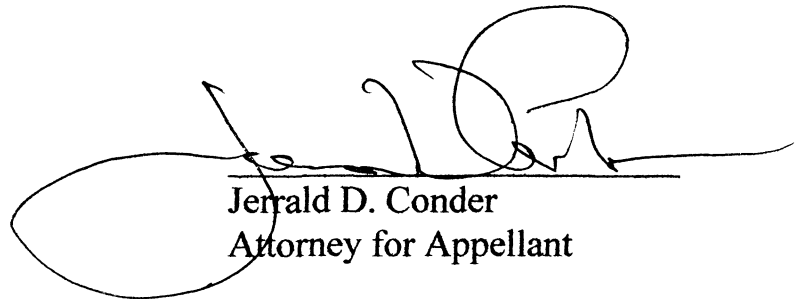
In this case, the findings of the Board of Appeal and argument herein, clearly establish that Travis Turner made unremembered statements while under the influence of alcohol and prescription medications. The circumstances existing at the time of the statement, as found by the Appeals Board, demonstrate Travis Turner's lack of intent to communicate at all and equally as important that could not have intended to make a threat. The fact that Travis Turner made a statement, while under the influence of alcohol and prescription medication does not support the Appeal Boards decision to affirm the termination solely because of the content of the statement.

Based on Travis Turner's lack of intent to communicate at all, or to make a threat, the facts relied upon by the board do not support its decision to affirm the termination. Additionally, the Board of Appeals by upholding the termination abused its discretion and exceeded its authority, by violating Travis Turner's First and Fourteenth Amendment rights by exceeding the narrowly tailored scope of the Districts policy to sanction employees for acts and or opinions stated in public (*Harmon v. Ogden City Civil Service Comm'n*, 171 P.3rd 1048 (UT. APP 2007)).

For the foregoing reasons the decision of the Board of Appeals must be held as an abuse of discretion because the facts do not support its conclusion and

further that the District exceeded its authority to sanction employees for non-public acts or statements.

DATED this 25th day of June 2009

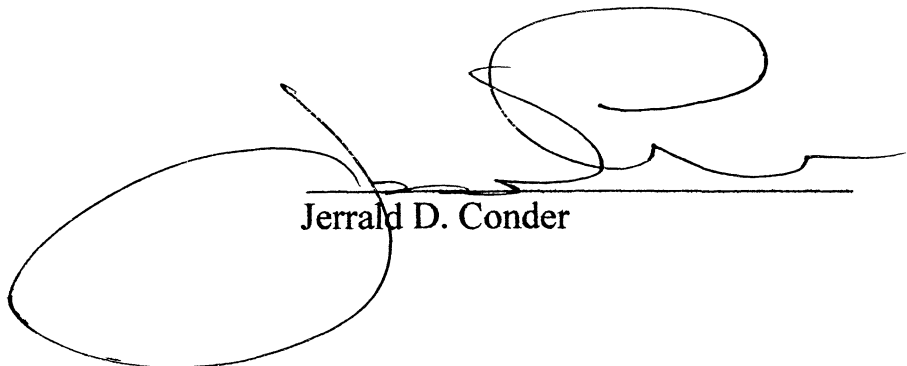


Jerrald D. Conder
Attorney for Appellant

CERTIFICATE OF MAIL

I hereby certify that I mailed, postage prepaid, a true and exact copy of the foregoing Appellant's Brief to the following party on the 25 day of June 2009:

David L. Church
5995 South Redwood Road
Salt Lake City, Utah 84123



Jerrald D. Conder

APPENDIX ONE

Amendment 1 - Freedom of Religion, Press, Expression. Ratified 12/15/1791.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX 2

Fourteenth Amendment

Section (1) All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section (2) Representatives shall be appropriate among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for the President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State or the members of the Legislatures thereof is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridge, except for participation in rebellion, or other crime the basis representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State .

Section (3) No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the

enemies thereof. But Congress may by vote of two-thirds of each House, remove such disability.

Section (4) The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section (5) The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX 3

CONSTITUTION OF THE STATE OF UTAH

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

APPENDIX 4 (1)

LONE PEAK PUBLIC SAFETY DISTRICT
POLICIES AND PROCEDURES

TITLE: EMPLOYEE TERMINATION

Effective Date: 07-01-99

Revised:

Approved by: PSD Board

Dist. To: All Personnel

Section 1: POLICY

It is the policy of this District to deal with employees fairly and equitably. Should disciplinary action become necessary to the point of terminating employment, the District will deal with each employee according to this policy.

Section 2: TYPES OF REMOVAL

- A. Resignation. A full-time employee who resigns shall submit his resignation in writing to his Department Chief and give at least two (2) weeks notice.
 - 1. The Public Safety Director, on the recommendation of the Department Chief, may shorten or waive the notice period.
- B. Temporary employment. Temporary employees may be terminated at such time as their assigned job is completed or funding for the project is exhausted.
- C. Probationary employee termination. A probationary employee may be terminated without cause.
- D. Unsatisfactory Service. An employee who has completed the probationary period may be terminated or subject to disciplinary action if his/her performance or conduct is not satisfactory; if he/she proves unsuited to his/her work; or if for medical reasons he/she is no longer qualified for the position.

Section 3: Disciplinary Procedure.

- A. Prior to termination, excluding termination pursuant to Sections 2, 4 and 5 of this policy, an employee shall be given a verbal or written warning and a reasonable time to rectify the problem.
- B. An employee whose conduct or performance is considered unsatisfactory

TITLE: EMPLOYEE TERMINATION

shall be subject to the following:

1. Counseling
2. Reprimand
3. Decision-Making Leave
4. Discipline

C. Types of Discipline: Employees who do not correct unsatisfactory conduct or performance, or who commit offenses of such a serious nature that require immediate expulsion from work, are subject to the following:

1. Suspension

An employee may be suspended with or without pay as a disciplinary measure. Suspension without pay requires a pre-disciplinary hearing and must have the approval of the Public Safety Director.

An employee may be suspended without pay for an indefinite period of time as a result of a criminal complaint in a court of law, in which case the suspension may continue until the matter is adjudicated by a court of competent jurisdiction. If the charges are not sustained, the District may still administer further discipline if the District can substantiate misconduct.

2. Demotion

An employee may be demoted as a result of disciplinary action. Prior to any demotion, an employee shall receive a pre-disciplinary hearing. Said hearing will be conducted by the appropriate Department Chief or Public Safety Director and will offer the employee the opportunity to present any information they so desire, in their behalf.

3. Probation

As a form of discipline an employee may be placed on probation for a period not to exceed six (6) months in an effort to further evaluate and rehabilitate the employee.

4. Termination

TITLE: EMPLOYEE TERMINATION

An employee may be terminated as a result of disciplinary action. Prior to termination, the employee shall receive a pre-termination hearing. Said hearing will be conducted by the appropriate Department Chief.

- D. Notification: An employee shall be notified in writing of any disciplinary action that could lead to suspension, demotion, or termination, and shall be afforded the opportunity to meet with the Public Safety Director (or his/her representative) to discuss the proposed disciplinary action prior to the action being taken. An employee may also respond to the proposed disciplinary action in writing.
- E. Records of disciplinary action, excluding oral warnings, will be retained in the employee's official personnel file for a two (2) year period, unless other disciplinary action occurs. If two (2) years have passed without any further discipline and the document is not the subject of a pending investigation, the disciplinary record will be removed from the personnel file upon written request of the employee to the Public Safety Director. Formal periodic evaluations are exempt from any removal process.

The employee shall have access to his/her personnel file, along with the employee's representative, while the employee is present. An employee may insert into the personnel file a rebuttal statement which is directly in response to written reprimands or negative commentary in the file. Upon the request of any employee they shall be given a copy of any material contained in their personnel file.

No item or information will be placed in an employee's personnel file without the employee's knowledge. It is not necessary that the employee agree with or approve the placement of any item or material in the personnel file. This is simply to ensure that the employee has knowledge of items or material(s) being placed in a personnel file. The employee's signature or initials on the item or material is sufficient to substantiate knowledge. Failure by an employee to sign or initial an item or material will not prevent that item/material from being placed in the personnel file. A supervisor will make a notation including the date on the item or material that the employee refused to sign or initial the item or material. The item will then be placed in the employee's personnel file.

- F. Any written record of discipline not previously provided to the employee will not be used as basis for subsequent progressive discipline.

TITLE: EMPLOYEE TERMINATION

Section 4: "MISCONDUCT" OR "CAUSE."

An employee may be disciplined, up to and including termination without prior warning for the following misconduct or cause. "Misconduct" or "Cause" includes, but not limited to:

- A. Violation of the criminal laws of the United States, the State of Utah or any other state, the violation of which, had it occurred in Utah would be a crime in Utah.
- B. Violation of any provision of the Charter of any member cities of the District
- C. Violation of District Rules.
- D. Outside employment which conflicts or interferes with assigned duties.
- E. Solicitation as District employees of the public for money, goods, or services not specifically authorized by the Public Safety Director.
- F. Acceptance or solicitation of a bribe or any compensation intended to influence the employee in the performance of his/her duties for the District.
- G. Divulgence of any confidential material to anyone not authorized to receive it.
- H. Conduct which discredits the District.
- I. Improper use of one's employment with the District for the employee's personal and/or financial advantage.
- J. Insubordination.
- K. Incompetency
- L. Inefficiency
- M. Neglect of duties.
- N. Unexplained absence from duty.
- O. Malfeasance, misfeasance or misconduct in office.
- P. Conduct unbecoming an employee.
- Q. Acts evidencing moral turpitude.
- R. Sexual or racial harassment action.
- S. Willful violation of safety practices in performance of duties, including operation of District equipment and vehicles.
- T. Alcohol or substance abuse on the job.
- U. Unauthorized use of District property, equipment and/or materials.

Section 5: ABANDONMENT OF POST

- A. An employee absent from duty in excess of three (3) days without a satisfactory explanation shall be considered to have abandoned his post and shall be terminated provided that the employee's Department Chief shall

TITLE: EMPLOYEE TERMINATION

make a reasonable effort to locate the employee.

- B. Reasonable effort to locate an employee shall be satisfied if the Department Chief sends a "mailgram" to the employee at the address shown in the employee's personnel file.
- C. Termination pursuant to this section shall be deemed to be for just cause.

Section 6: ELIMINATION OF POSITIONS AND PROCEDURE FOR REDUCTION IN FORCE.

- A. The District may eliminate any position.
- B. When a position is eliminated and/or a reduction in force takes place, the following procedure will apply:

An employee to be terminated because of the elimination of his/her job or a reduction in force shall be permitted to exercise his/her seniority to move laterally or downward within the same Department to a position for which the employee has the immediate skill and ability. The sole determination of the employee's skill and ability shall be determined by the District. It is understood that any positions currently federally funded are not subject to this procedure should a reduction in force occur due to cessation of federal funding.

Failure to immediately perform all duties of the position subjects the employee to immediate dismissal, with no right of recall.

Should an employee elect not to use his right to move he shall have first right of recall in accordance with his/her re-employment in relation to filling the original position that was eliminated.

- C. Termination under this section shall require at least two weeks notice to the employee or payment in lieu of notice.

Section 7: NOTICE

- A. Written notification. Any termination under this Article shall be in writing and shall set forth the reasons for such termination.

TITLE: EMPLOYEE TERMINATION

- B. No appeal. Terminations pursuant to Sections 2 (A), (B) and 6 (A) above shall not be subject to the grievance or arbitration provisions.

LONE PEAK PUBLIC SAFETY DISTRICT
POLICIES AND PROCEDURES

TITLE: GRIEVANCE PROCEDURE

Effective Date: 07-01-99

Revised:

Approved by: PSD Board

Dist. To: All Personnel

Section 1: POLICY

It is the policy of this District to provide a grievance procedure for those employee's who feel they have been dealt with in a contrary, unfair or unjust manner.

Section 2: PROCEDURE

A. The purpose of the Grievance Procedure shall be to settle all grievances between the District and the employee as quickly as possible to insure efficiency and promote employee morale. Should any employee, group of employees, or the District feel aggrieved, including the claim of unjust discrimination or any matter or condition affecting health and safety beyond those normally encountered in all phases of normal work requirements, adjustment shall be sought as follows:

1. In order to promote harmony, the employee is encouraged to discuss matter in dispute with the immediate supervisor first.
2. All grievances must be filed in writing, within five (5) working days after the matter in dispute or disagreement is alleged to have occurred;

Step 1: The grievance shall first be discussed between the employee and the immediate supervisor within five (5) working days of its filing. If the grievance is not settled during this informal discussion, it may be processed to Step 2.

Step 2: Within three (3) working days from the date of informal discussion with the immediate supervisor(s), but not later than eight (8) working days after the act or omission giving rise to the grievance, the immediate supervisor shall present the grievance, in writing, to the Department Chief or his representative. The Department Chief or his representative shall arrange for such meetings with the Employee and make such investigations

TITLE: GRIEVANCE PROCEDURE

as are necessary. The Department Chief shall respond in writing to the aggrieved within five (5) working days of his receipt of said grievance. If the response does not resolve the grievance, it may proceed to Step 3.

Step 3: Within three (3) working days from receipt of the written response from the Department Chief, the employee shall present the grievance, in writing, to the Public Safety Director, accompanied by all correspondence and existing evidence on the matter. The Public Safety Director after consultation with the aggrieved employee, will make a determination within five (5) working days from the date of submission to him.

Step 4: If a mutually satisfactory settlement cannot be reached between the Public Safety Director and the Employee, the Employee shall file notice within five (5) working days with the Public Safety District Board for final determination.

1. When such notice is filed with the Public Safety District Board, the Board shall hear the matter within a thirty (30) day period.
 2. If such notice is not filed within five (5) working days with the Public Safety District Board the grievance shall be deemed withdrawn with prejudice.
- C. Upon a final determination on the matter, having been made by the Public Safety District Board, each party retains any legal right for further action they deem necessary.

LONE PEAK PUBLIC SAFETY DISTRICT
POLICIES AND PROCEDURES

TITLE: INTERNAL INVESTIGATIONS

Effective date: 07-01-99

Revised:

Approved By: PSD Board

Dist. To: All Personnel

Section 1: POLICY

It is the policy of this District to investigate all complaints of possible employee misconduct to determine whether allegations are valid or invalid and to take appropriate action.

Section 2: DEFINITIONS

A. COMPLAINT

An inquiry, request or demand that the District investigate possible employee misconduct. A complaint may be initiated by ANY person, including District employees. Known as a "Citizen's Complaint" when initiated by a person outside the District.

B. ADMINISTRATIVE INVESTIGATION

An administrative process whereby the District investigates complaints.

Section 3: GUIDELINES

A. RELEASE OF INFORMATION

Information related to an administrative investigation may only be released to the media or outside interests at the direction of the Public Safety District Board or their designee.

B. COMPLAINTS WITH SIMILAR CONTEXT

When three (3) or more complaints of a similar context arise against any one employee within any twelve (12) month period, all subsequent complaints of that nature may be classified as FORMAL at the direction of

TITLE: INTERNAL INVESTIGATIONS

the Department Chief.

C. POLYGRAPH/TRUTH VERIFICATION

1. Employees will not be ordered or directed to submit to a polygraph or truth verification examination on any matter under investigation by this District. Nothing in this policy is intended to deny the District from requesting an employee to submit to a polygraph or truth verification examination. No disciplinary action may be taken against any employee for refusing to submit to a polygraph/truth verification examination.
2. Nothing in this policy is intended to deny an employee the privilege of requesting a polygraph/truth verification examination when they feel that it is their best interest.
3. Should a polygraph or truth verification examination be taken/given the party requesting the examination shall pay the cost of said examination.

Section 4: CRIMINAL VS. ADMINISTRATIVE INVESTIGATIONS

A. PRECEDENCE

A criminal investigation shall take precedence over an administrative investigation. When an employee becomes the focus of a criminal investigation, no administrative investigation shall be initiated until:

1. Such time notification is received by the Director of Public Safety investigation has either been concluded or initiation of an administrative investigation would not otherwise compromise the criminal investigation.
2. At that time, the Director of Public Safety shall make a determination as to whether an administrative investigation is conducted.
3. In cases of criminal investigations, notification to the involved employee(s) shall not be made until such time that it is determined by the Chief of Police that notification would not interfere with the

TITLE: INTERNAL INVESTIGATIONS

criminal investigation.

B. RESPONSIBILITY FOR INVESTIGATION

1. All criminal investigations will be performed by the Police Department unless otherwise directed by the Chief of Police.
2. Administrative investigations will be performed by a supervisor.

Section 5: PROCEDURES

A. INITIATING COMPLAINTS

2. A complaint may be initiated by any person. A complaint may be communicated by mail, telephone, electronic message or in person. The complainant may identify him/herself or remain anonymous. Any person may be informed that a complaint may be made to any of the following:
 - a. Appropriate Department Chief
 - b. Director of Public Safety.
 - c. Any PSD Board member.
 - d. Utah County Attorney's Office.
 - e. Federal Bureau of Investigations (FBI).
2. Non-supervisory personnel initiated a personal complaint or receiving a citizen complaint should direct the complaint/complainant to their immediate supervisor or to a Department Chief.
3. Supervisory personnel initiating a personal complaint receiving a citizen complaint or having a complaint/complainant forwarded to them by non-supervisory personnel will review the allegations and classify the complaint. If the complaining citizen is insistent upon filing the complaint with the supervisor at the time of contact, the supervisor will fill out the CITIZEN'S COMPLAINT FORM, give the citizen witness statement forms to fill out and forward the complaint to their Department Chief.

B. CLASSIFYING COMPLAINTS

1. A complaint may be classified as INFORMAL when the complaint alleges

TITLE: INTERNAL INVESTIGATIONS

minimal misconduct, the alleged violation does not meet the criteria for this manual's definition of MISCONDUCT, and the complainant does not wish to file a written complaint. A complaint that meets the definition of MISCONDUCT will be classified as FORMAL and referred as outlined, even if the complainant does not wish to file a written complaint.

2. A complaint will be classified as FORMAL, when:
 - a. the complaint may result in an employee facing discipline beyond verbal admonishment and/or training.
 - b. the complaint alleges any unnecessary or excessive use of force.
 - c. the complaint may require having the employee:
 - (1) participate in a lineup of any form.
 - (2) submit to a medical/laboratory examination.
 - (3) submit financial disclosure.

C. FORWARDING COMPLAINTS

Once a complaint has been classified, the supervisor has three (3) options in forwarding the complaint for preparation of investigation:

1. If the supervisor is within the involved employee's chain of command he/she may retain and prepare the complaint for investigation.
2. If the supervisor is not within the involved employee's chain of command the supervisor will forward the complaint to the appropriate chain of command, with every effort made to forward the complaint to a rank similar to their own.
3. Forwarded to the accused Department Chief if the complaint is of serious nature or may require extensive investigation (even though not a citizen complaint).

D. PREPARING COMPLAINTS

1. The preparation of INFORMAL complaints for investigation does not require the use of any District form or report. It is the

TITLE: INTERNAL INVESTIGATIONS

supervisor's responsibility to ensure that the complaint will be professionally addressed.

2. The preparation of FORMAL complaints for investigation requires the use of District forms. The forms required are:
 - a. a CITIZEN'S COMPLAINT FORM (only when initiated by a citizen, not when initiated internally).
 - a. a NOTICE OF ADMINISTRATIVE INVESTIGATION.
 - b. Witness Statements, from complainant or persons providing information.
3. Whenever a NOTICE OF ADMINISTRATIVE INVESTIGATION is prepared a copy shall be immediately forwarded, through the chain of command, to the Office of the Director of Public Safety. A copy will also be given to the Public Safety District Board to inform them of the investigation.

E. INVESTIGATING INFORMAL COMPLAINTS

Supervisors investigating complaints classified as INFORMAL, shall:

1. Notify the involved employee who is the focus of the complaint no later than ten (10) calendar days after receipt/initiation of the complaint by the District and allow the employee to respond to the complaint in writing.
2. Conclude the investigation and forward a memo indicating resolution to the Department Chief.
3. Notify the involved employee of the resolution of the INFORMAL complaint. The employee may again respond in writing and have such writing included in the completed investigative package, a complete copy of which shall then be provided to the involved employee.
4. Refer to Section F of this policy if at any point during an INFORMAL investigation, a determination is made that a FORMAL investigation is required.

TITLE: INTERNAL INVESTIGATIONS

5. Forward complete INFORMAL investigative package to the Department Chief.

F. INVESTIGATING FORMAL COMPLAINTS

Supervisors investigating complaints classified as FORMAL, shall:

1. Notify the involved employee who is the focus of the complaint no later than ten (10) calendar days after receipt/initiation of the complaint by the District. Notification shall be made by having the employee sign and receive a copy of a NOTICE OF ADMINISTRATIVE INVESTIGATION.
2. Obtain a written or tape recorded statement from the employee concerning the allegations outlined in the complaint.
3. Notify the Department Chief, through the chain of command, in writing every ten (10) calendar days as to the status of the on-going investigation.
4. Conclude the investigation and forward a SUPERVISOR'S REPORT OF DISCREPANCY to the Department Chief through the chain of command.

The Department Chief shall:

5. Review the material, assign a disposition and indicate what action is to be taken, if any.
6. Notify the involved employee and the complainant, if known, of the resolution of the FORMAL complaint.
7. The employee may again respond in writing and have such writing included in the investigative package, a complete copy of which will then be provided to the employee.
8. Notification to the complainant shall include only the disposition of the complaint and shall not include supporting documents or action taken.

TITLE: INTERNAL INVESTIGATIONS

G. DISPOSITIONS

When an Administrative Investigation has been concluded, a disposition shall be assigned as follows;

1. Exonerated: the alleged conduct occurred, but was lawful or proper.
2. Unfounded: the allegation is false or not factual.
3. Not Sustained: insufficient evidence to either prove or disprove allegation.
4. Sustained: sufficient evidence to prove the allegation.
5. Misconduct Not Based on Original Complaint: sustained acts of misconduct, not alleged in the complaint.
6. Policy/Procedure Failure: Flaw in policy caused incident.

H. DISCIPLINARY ACTION

Disciplinary action may include:

1. Training.
2. Counseling.
3. Verbal reprimand.
4. Written reprimand.
5. Suspension without pay.
6. Probation.
7. Demotion.
8. Termination.

Discipline received may be one or more of the above listed actions depending on the severity of the infraction/misconduct.

I. RETAINING ADMINISTRATIVE INVESTIGATION PACKAGES

All complaints and investigative packages shall be retained by the Director of Public Safety. No other record of a complaint shall be made in any other file, except when disciplinary action is taken following a FORMAL complaint. A copy of the letter sent to the employee by the Department Chief indicating the disciplinary to be taken shall be forwarded to the

TITLE: INTERNAL INVESTIGATIONS

employee's District Personnel File and immediate supervisor for reference purposes.

To be completed by District Employee Receiving Complaint

To be completed by District Employee Receiving Complaint

Location of Occurrence: _____

Date & Time of Occurrence: _____

Alleged Misconduct of Employee (brief narrative):

[illegible]

Person Receiving Complaint: _____ Date: _____ Time: _____ Hrs. _____

COMPLAINANT GIVEN A STATEMENT FORM TO RETURN TO SUPERVISOR THE NEXT WORKING DAY IF NOT FILLED OUT IMMEDIATELY

NOTE: CITIZEN WILL BE ADVISED OF RESULTS OF INVESTIGATION

Under Utah Law it is a misdemeanor offense to give false information to a peace officer.

Signed: _____

Receiving Supervisor

Citizen

LONE PEAK PUBLIC SAFETY DISTRICT
POLICIES AND PROCEDURES

TITLE: MANAGEMENT RIGHTS

Effective date: 07-01-99

Revised:

Approved By: PSD Board

Dist. To: All Personnel

Section 1: POLICY

It is policy of this District to maintain specific rights, by management for the purpose of efficient operation of the District.

Section 2: EXPRESS RIGHTS

- A. The District possesses the sole right to operate the District and all management rights remain with the District. These rights include, but are not limited to, the following:
1. The right to hire, direct, assign, promote, transfer, classify, suspend, demote, discharge, or discipline employees;
 2. The right to maintain the efficiency of its operations;
 3. The right to relieve any employee from duty, to reduce in force or lay off any employee because of lack of work or lack of funds. Or for any other legitimate reason;
 4. The right to determine appropriate staffing levels and work performance standards;
 5. The right to determine the content of the work day including the work load, the number of days which will constitute the work week, the number of hours which will constitute the work day, and the specific day to be designated as payday;
 6. The right to determine the quality and quantity of services offered to the public, and the manner and means of offering those services;
 7. The right to issue, amend or revise policies, rules, regulations and practices it deems necessary to carry out all managerial and

TITLE: MANAGEMENT RIGHTS

administrative prerogatives and;

8. The right to establish, change, combine, or eliminate jobs, positions, job classifications and descriptions.

Section 3: OTHER RIGHTS

The above are inclusive management rights, but other rights may also be possessed by the District.

APPENDIX 4 (2)

LONE PEAK PUBLIC SAFETY DISTRICT
POLICIES AND PROCEDURES

TITLE: PERSONAL CONDUCT

Effective date: 07-01-99

Revised:

Approved By: PSD Board

Dist. To: All Personnel

Section 1: POLICY

It is the policy of this District that all employee's personal conduct is such that no discredit nor lack of public trust is placed upon the District.

Section 2: GENERAL

The conduct of Public Safety District employees in dealing with the general public is expected and required to be commensurate with the high level of public trust placed upon the Public Safety profession. Any public action, inaction, attitude or opinion of personnel which can be interpreted as unprofessional or unworthy of the public trust in Public Safety Officials tends to undermine and detract from the public respect of Public Safety Members individually and collectively.

Without this public respect, our jobs become extremely difficult, if not impossible. This respect, however, cannot be legislated by any authority. Public respect must be earned by exemplary conduct in the performance of duties.

Each member shall so regulate his or her conduct so that no action on his or her part could result in unfavorable criticism of any such sworn or civilian employee of the District.

Section 3: CONDUCT

The following acts or omissions shall be prohibited by members of the District. A member may be disciplined or dismissed from the District for any act herein enumerated if the act seriously impairs department operations or seriously undermines the public confidence in the Department or District.

- A. Members shall not willfully violate any Federal, State, local law or ordinance.
- B. Members shall not engage in games of chance in violation of any law

TITLE: PERSONAL CONDUCT

except in performance of duty, with appropriate consent.

- C. Members shall not possess or use marijuana or any other form or illegal contraband, including unauthorized narcotics.
- B. Members shall be respectful, courteous and civil with the public and each other and shall not use coarse, loud, indecent, profane or unnecessarily harsh language, or in any way conduct themselves in a disorderly manner.
- C. Members shall not become a part of any organization, association, movement, group, or combination which has adopted a policy of advocating violence or acts of force to deny others their constitutional rights; or who seek to alter the form of government by unconstitutional means; or who advocate racial or religious discrimination as a political philosophy or objective.
- D. Members shall not misuse the Public Safety radio. Misuse will include: inappropriate language, unprofessional phrases or slang, use of the Public Safety District radio system for personal reasons or personal gain.
- E. No member shall be derelict in their duty. The following acts or omissions shall constitute dereliction of duty:
 - 1. Failure to obey orders, willful or repeated violation of any rule, regulation, or policy of the department.
 - 2. Failure to make a proper report of incidence investigated, observed, or reported.
 - 3. Failure of a member to give his or her name to any citizen upon request or failure to display District identification if in civilian clothes and off-duty. Under exceptional circumstances, such as authorized undercover work, or for the members personal security, this regulation may be suspended.
 - 4. For any member to be absent on unauthorized leave.
 - 5. For cowardice or failure to support fellow members or failure to perform official duties because of fear.

TITLE: PERSONAL CONDUCT

6. For sleeping while on duty (except in authorized circumstances).
 7. For failure to complete required training requirements.
 8. For neglect of duty.
 9. For displaying reluctance to properly perform assigned duties, or acting in a manner tending to bring discredit upon himself, herself or the District. Failing to assume responsibility or exercise diligence and interest in pursuit of duties, or displaying a lack of energy of such character as to amount to incompetency.
 10. For criticism of superior or fellow officers.
 11. For political activities while on duty or in a duty role.
 12. Conduct unbecoming to a Public Safety employee.
 13. Failure of a Supervisor or Commander to immediately take action when the violation comes to his/her attention.
- F. Members shall avoid unnecessary conversations or controversy and give his or her name in a respectful manner to any person who may request the same when acting in any official capacity.
- G. Members shall avoid answering questions in a short or abrupt manner and shall give the greatest possible attention and courtesy.
- H. Members shall not loiter in cafes, drive-ins, or other public places except for the purpose of conducting District business or taking regular meals or refreshments.
- I. Members shall not use their position with the District to gain any personal advantage concerning the obtaining of goods, products or services.
- J. Members shall not appropriate lost, found, stolen evidence or District property to his/her own use.
- K. Members shall not feign sickness or injury to escape duty.

TITLE: PERSONAL CONDUCT

- L. Members shall handle all District property with care in an effort to prevent damage due to carelessness.
- M. When off duty, police officers may carry or have in their immediate possession their badge, weapon and issues identification.

Section 4: DRESS - COURT/TRAINING CLASSES

- A. Members appearing in any Court or public hearing shall be dressed either in full uniform, (including a sidearm for police officers); or conservative clothing which shall include a necktie and jacket. Members shall not appear in court in part of the official uniform or in what is termed "sports attire."

Police Officers wearing civilian clothing may carry an off-duty weapon if they so desire so long as the weapon is covered and the Police Officer is carrying appropriate Police I.D.

- B. All members shall dress appropriately when attending training classes. Unless otherwise directed by the type of training received, (i.e. firearms, defensive tactics, etc.), all members will wear neat, clean conservative clothing. Each member will present himself/herself with a professional appearance as he/she represents himself/herself at training classes and represent the District.

The only exception to this policy will be in the event of emergency call-out where no previous notice was given.

Section 5: PUBLIC APPEARANCES

On occasion, Public Safety personnel are requested or invited to make public appearances on radio, television, or publicly in an official capacity. Such invitations will not be accepted unless the Department Chief has reviewed and approved such an appearance. Any member may make appropriate recommendations concerning official public appearances and suggest the member most appropriate for the occasion. Members should strongly consider referring requests for public appearance to the respective Department Chief. Any unplanned public appearance does not necessitate prior approval by the Department Chief.

Section 6: USE OF ALCOHOL

TITLE: PERSONAL CONDUCT

- A.** No member shall drink or purchase intoxicants while wearing his/her uniform.
- B.** No member shall drink intoxicants while on duty unless authorized in the performance of duty (i.e. undercover).
- C.** No member shall report for a regular tour of duty or be on a regular tour of duty while under the influence of alcohol, or be unfit for duty because of such use. The odor of an alcoholic beverage on the breath will be considered suspicion for impairment entitled see section of rules and regulation on Alcohol/Drug free work place.
- K.** No member shall consume, nor keep intoxicating liquor at any Public Safety building, locker room, a District vehicle, or upon any property allotted for the use of the District. This does not apply to legally seized evidence being transported pursuant to an active case. Nor does this section apply to the police evidence vault.
- L.** Members shall not appear in public places while intoxicated, whether on or off-duty.
- M.** Members shall not excessively use intoxicants.

Section 7: USE OF NARCOTICS

- A.** No member shall use or purchase narcotics while wearing his/her uniform.
- B.** Member shall not use or possess narcotics, nor dangerous or habit forming drugs, unless such drugs or narcotics are properly prescribed by a physician or dentist for an illness, injury, or other such legitimate treatment.
- C.** Allowances for possession and simulated of drugs by undercover agents shall be made.
- D.** No member shall consume, nor keep narcotics at any public safety building, any locker room, a District vehicle, or upon any property allotted for the use of the District. This does not apply to legally seized evidence being transported pursuant to an active case. Nor does this section apply to evidence.

TITLE: PERSONAL CONDUCT

Section 7: INCOMPETENCE

Members shall conduct their duties in a competent and efficient manner and are expected to exercise good judgement in the performance of their assignments.

A. LOW PERFORMANCE

Members shall not engage in any activity that lowers their ability to perform their assignment and obligations.

Section 8: PATRIOTIC COURTESY

- A.** On all public occasions, all of the members of the Police Department who are in uniform shall salute the National Colors and the playing of the National Anthem with the hand salute in a military manner. The only exception shall be whenever officers are performing police duty requiring immediate action or in formation when salute is made by Commander or Officer in charge.
- B.** All civilian employees and all members of the District who are not in uniform shall render the National Colors and the National Anthem the honors and courtesies customarily accorded to them. Such members shall stand at attention, and the men shall remove their hats while the National Colors are passing by and while the National Anthem is being played.

Section 9: RELIGIOUS AND PERSONAL VIEWS

Members shall not, while on duty or in uniform, engage in religious debates or discussions to the detriment of good discipline, nor speak despairingly of the nationality, race or beliefs of any person.

Section 10: GRATUITIES**A. PURPOSE**

The intent of this is to set forth the policy of the District relative to the acceptance of gratuities or gifts by members of this District.

B. POLICY

TITLE: PERSONAL CONDUCT

1. It shall be the policy of this District to follow guidelines set forth in the Utah State Code which deals with accepting gifts or loans. (Utah Code 67-16-5)
2. All members of this District, including sworn, non-sworn, temporary, and part-time, shall not solicit or encourage gratuities or gifts to be offered, while either on-duty or off-duty.

C. GRATUITIES OR GIFTS DELIVERED

Any gratuity or gift with a value of \$50 or more delivered to any member of this District for his/her own use or dissemination among other members shall be immediately reported to the Recipients Department Chief, who intern will relay this information to the Director of Public Safety.

APPENDIX 5

76-5-107. Terroristic threat -- Penalty.

(1) A person commits a terroristic threat if he threatens to commit any offense involving bodily injury, death, or substantial property damage, and:

(a) he threatens the use of a weapon of mass destruction, as defined in Section 76-10-401, or threatens by the use of a hoax weapon of mass destruction, as defined in Section 76-10-401; or

(b) he acts with intent to:

(i) intimidate or coerce a civilian population or to influence or affect the conduct of a government or a unit of government;

(ii) cause action of any nature by an official or volunteer agency organized to deal with emergencies;

(iii) place a person in fear of imminent serious bodily injury, substantial bodily injury, or death; or

(iv) prevent or interrupt the occupation of a building or a portion of the building, a place to which the public has access, or a facility or vehicle of public transportation operated by a common carrier.

(2) (a) A violation of Subsection (1)(a) or (1)(b)(i) is a second degree felony.

(b) A violation of Subsection (1)(b)(iv) is a third degree felony.

(c) Any other violation of this section is a class B misdemeanor.

(3) It is not a defense under this section that the person did not attempt to or was incapable of carrying out the threat.

(4) A threat under this section may be express or implied.

(5) A person who commits an offense under this section is subject to punishment for that offense, in addition to any other offense committed, including the carrying out of the threatened act.

(6) In addition to any other penalty authorized by law, a court shall order any person convicted of any violation of this section to reimburse any federal, state, or local unit of government, or any private business, organization, individual, or entity for all expenses and losses incurred in responding to the violation, unless the court states on the record the reasons why the reimbursement would be inappropriate.

APPENDIX 6

76-8-313. Threatening elected officials -- Assault.

A person commits assault on an elected official when he attempts or threatens, irrespective of a showing of immediate force or violence, to inflict bodily injury to the elected official with the intent to impede, intimidate, or interfere with the elected official in the performance of his official duties or with the intent to retaliate against the elected official because of the performance of his official duties.

76-8-314. Threatening elected officials -- "Elected official" defined.

As used in this section, "elected official" means:

- (1) any elected official of the state, county, or city and includes the members of the official's immediate family;
- (2) any temporary judge appointed to fill a vacant judicial position;
- (3) any judge not yet retained by a retention election;
- (4) any member of a school board; and
- (5) any person appointed to fill a vacant position of an elected official as defined in Subsection (1).